Limits and Challenging Factors of the Dispute Settlement Mechanism in the Light of China-ASEAN Free Trade Agreement Perspective

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Abstract
The aim of this article is to understand the dispute settlement mechanism in the ASEAN-China Free Trade Agreement, hereinafter ACFTA. The ACFTA consists of ten ASEAN members plus one, namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, Vietnam and China. This article will present the current situation and motives behind China and the ASEAN's Free Trade Area engagement. The ACFTA was signed in order to embrace the opportunities and face the challenges of being integrated into the region's economy. One of the major limitations of ASEAN economic regulation, especially free trade regulation, is the ASEAN's underdeveloped Dispute Settlement Mechanism (DSM). Interestingly, the number of cases that have arisen under the ACFTA is nil since its creation in 2005, which places the ACFTA DSM in doubt over its effectiveness. The legal problems regarding the China-ASEAN free trade area (FTA) will also be discussed in this article. Furthermore, this article focuses on what would be an appropriate DSM's framework, and its legal issues concerning how the dispute settlement mechanism from the perspective of the ACFTA, should be developed in order to improve the China-ASEAN dispute resolution mechanism and facilitate legal research of countries in the region.
Keywords: Association of Southeast Asian Nations, China-ASEAN Free trade Agreement, Dispute Settlement Mechanism, Free Trade Area

Introduction
On the 5th November 2002 in Phnom Penh, Cambodia, at the sixth China-ASEAN Summit, the leaders of both China and ASEAN members signed the Framework Agreement on China-ASEAN Comprehensive Economic Cooperation (hereinafter the Framework Agreement), creating the beginning of the China-ASEAN Free Trade Area (ASEAN, 2002). On the 1st January 2010, the full establishment of the ASEAN-China FTA was signed as China's first free trade agreement with a foreign nation (Greenwald, 2006: 198). The eleven countries committed themselves to the Framework Agreement to strengthen cooperation and to progressively liberalize and promote trade in goods and services, also to create a transparent, liberal and facilitative investment regime under Article 1(b) of the Framework Agreement. This cooperation covered the Agreement on Trade in Goods, the Agreement on Trade in Services, the Agreement on Investment, the dispute settlement mechanism and economic co-operation. On 22th November 2015, the amendments on the Framework Agreement on Comprehensive Economic Co-Operation between ASEAN and China was signed for further development of the Framework Agreement. The new updating supports further economic cooperation integration, including amendments to the agreement on trade in Goods, Services, Investment and Economic and Technical Cooperation (ECOTECH). The establishment of the

China-ASEAN free trade area (FTA) brings more closely together economic and trade relations which support the economic growth and commercial aspects of the region. The article addresses the overall direction and current status of ASEAN-China trade. Besides, this article will contain an illustration of how the ACFTA deals with the problematic issue of the relationship between China and the ASEAN countries regarding the dispute settlement mechanism; for instance, the lack of information, the lack of legally binding rules without any penalty**,** the absence of non-compliance and the problem of the ASEAN Way. An appropriate framework for the ACFTA's dispute settlement mechanism is driving it to push for successful integration. The success of free trade may depend on the legal reforms for the implementation of the ACFTA, whereas the ACFTA in the long term concerning the ASEAN, shows there is a lack of a capable dispute resolution mechanism. While an appropriate framework for the ACFTA's dispute mechanism needs to be discussed regarding the challenges it faces, the ACFTA agreement will undoubtedly be confronted by many more challenges as well as opportunities.

Overall Direction and Current Status of ASEAN-China Trade

There are three types of FTAs in the East Area; firstly, there is a sub-regional grouping like the bilateral agreements between two economies, for example, the China-Singapore Agreement. Secondly, there is the "ASEAN plus one" formula, like the recently concluded China-ASEAN FTA. Thirdly, the proposal of one country outside the ASEAN-ASEAN Comprehensive Economic Partnership which may include an FTA element.

The aim of the ASEAN FTA is to encourage and promote businesses of all sizes in the ASEAN to trade regionally as well as internationally without tariff barriers. The benefits of an ACFTA will increase the ASEAN's exports to China by 48% and China's exports to ASEAN by 55.1%. By 2017, the bilateral trade volume between China and the ASEAN had reached 514.8 billion US dollars, up 13.8% over the same period of the year in 2016, 9.4 times the bilateral trade volume in 2002, which is an average annual growth rate of 20%. Currently, the ASEAN has been raised to the third largest trading partner ranking in China from fifth place, China is ranked at the top from the third in the ASEAN's trading partners in terms of trade volume (Wang, 2018:723). Governments believe that the formation of an ACFTA agreement in the ASEAN and China will enhance efficiency in economic areas, such as increase productivity and economic welfare, as well as bring more attractive investment into the Southeast Asia region (Ewing Chow, 2006:252).

Outside the ACFTA, China is also an FTA partner with Singapore, by way of its membership of the ASEAN, which has signed an FTA with Singapore-The China-Singapore Free Trade Agreement (CSFTA) on 12th November 2018 in Singapore (Aseanbriefing, 2018). Moreover, China is also seeking the possibility of establishing bilateral FTAs with Thailand and the Philippines. This means that China is now actively participating in international trade and is promoting economic development in the Asia Pacific region.

ACFTA Dispute Settlement Mechanism: Institutional and Jurisdictional Issues

The specific mechanism for the settlement of disputes under the ACFTA is provided through the Agreement on dispute settlement mechanism of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People's Republic of China, hereinafter "DSM of the Framework Agreement", which consists of 18 articles (Centre for WTO and Economic Integration Vietnam Chamber of Commerce and Industry, 2005). The ACFTA dispute settlement procedure comprises of three stages. First, Article 4 of the ACFTA DSM provides a mechanism for consultations. The

second stage is conciliation or mediation, the party may at any time agree to commence conciliation or mediation, and may continue conciliation or mediation even during the arbitration proceedings of the case. The last stage is arbitration.

The ASEAN-China free trade agreement follows the pattern of China for the dispute settlement mechanism in the FTAs, whose mutual support is the first means of resolving disputes, and obliges the parties to make every attempt through cooperation; any disputes concerning the interpretation, implementation or application of the ACFTA shall be settled with an amicable satisfactory resolution by consultations or mediation as stated in Article 11 of the Framework Agreement.

The nature of the ACFTA DSM is mirrored by the ASEAN DSM. There is a slight difference in the dispute settlement timeline and some procedural details. The ACFTA DSM governs all disputes that may arise between members as stated in Article 2(5), (8) of the ACFTA DSM Framework. In connection with the World Trade Organization (WTO) DSM, there are so many options for the alternative dispute settlement mechanism, such as the parties can request for the consultations, conciliation or mediation as stated in Article 4-6 of the ACFTA DSM Framework. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, in cases of urgency, including those related to perishable goods, the complaining party can make a written request to the party complained against to appoint an arbitral tribunal within 20 days. Article 2 (5) and (6) of the ACFTA DSM Framework shows that dispute settlement mechanisms within the ACFTA should be without prejudice to the rights and obligations under the WTO Agreement and other international agreements and should not duplicate or detract from WTO institutions and procedures.

The examination of the role of the alternative dispute resolution litigation under the WTO dispute settlement needs to be discussed via the basic concept, which the ACFTA DSM can learn from, and consider how much these approaches have influenced dispute settlements under the presently existing Free Trade Agreement. Arbitral procedure plays an important role which allows each party to appoint its own arbitrator to help move towards mutual agreement. Article 7 of the ACFTA DSM addresses that if mutual agreement is not reached, the ACFTA DSM provides for the chair to be named by an external neutral party. It can be the Director-General of the WTO, but not a national of either party, or the President of the International Court of Justice where one of the parties to the dispute is not a WTO member. This makes clear that the arbitral tribunal is only established on an ad hoc basis. An appointed arbitral tribunal shall meet in a closed session (Ewing Chow, 2006: 252).

An arbitral tribunal is composed of three arbitrators. Each of the two parties appoint one arbitrator. The two parties endeavour to agree on an additional arbitrator who shall serve as chair. The parties to the dispute shall be present at the meetings only when invited by the arbitral tribunal to appear before it. The arbitral shall release to the parties to the dispute its final report within 120 days from the day of its composition and 60 days in cases of urgency. Reasons for any supposed delay will be provided in writing, together with as estimate of the period it will issue its report. Moreover, the final report of the arbitral tribunal shall become a public document within 10 days after its release to the parties concerned (Ewing Chow, 2006: 252).

The relationship between the ACFTA and the World Trade Organization (WTO) would be addressed as a result of there being eight references to the WTO within the ACFTA Framework Agreement. Additionally, the Preamble of the ACFTA Framework Agreement states "REAFFIRMING of the rights, obligations and undertakings of the respective parties under the WTO, and other multilateral, regional, and bilateral agreements and arrangements." As can be seen, most signatories to the ACFTA are WTO members, so it is important for the ACFTA to comply with WTO disciplines. As of January 2019, regarding ASEAN countries and the WTO, there were ten member countries, all ten of which were also WTO members. Cambodia joined

the WTO on the 13th October 2004, Brunei Darussalam became a WTO member on 1st January 1995; Indonesia, Malaysia, Myanmar, Philippine, Singapore and Thailand joined the WTO on the 1st January 1995; Vietnam joined the WTO on the 11th January 2007 and Lao PRD has a WTO membership (World Trade Organization, 2019).

Problems Associated with the Implementation of ACFTA Dispute Settlements

Although the ACFTA has made good developments, there still exist by many more challenges that require further efforts in the dispute settlement system. The following are the major problems;

To start with, an agreement on the Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation between the ASEAN and the People's Republic of China (ACFTA) entered into force on 1st January 2005. Article 11 of the Framework Agreement provides the timeline to establish the formal dispute settlement procedures which are supposed to be brought into force within one year of entry into the Framework. China completed its dispute settlement procedure in the year 2005, which was more than one year from the date of entry in 2003. This situation shows that there is a problem with the enforcement institutions. As mentioned earlier, since the adoption of the ACFTA, no cases have ever brought a single dispute to be resolved through the ACFTA and the ACFTA has never been tested. Despite the creation of increasingly elaborate mechanisms to resolve disputes through the ACFTA dispute settlement, these mechanisms do not appear to be used. Some ASEAN Scholar suspect the reasons why the ASEAN and China do not utilise the mechanisms (Kawashima, 2011: 10-11) are as follows:

1) Lack of information: The ACFTA DSM does not have well-developed institutional support structures to report results widely. Even when dispute results are published, they may be in only one local language. Chinese is the language of China, and in the ASEAN there are many varieties of language, such as Englih, Thai, Laos, Vietnamese, etc.

2) Less confrontation in ASEAN culture through applying the ASEAN Way: The ASEAN Way is based on three principles, namely, (1) respect for state sovereignty, (2) non-intervention, and (3) the peaceful resolution of conflict. The structure of the ASEAN follows the cultural norms and traditions of the ASEAN Way in both decision-making and dispute settlement, which means that it was founded as a loosely structured organisation (Lee, 2006) as per the ASEAN's unique consensus approach. The consensus is more likely to be of a negotiable and political or diplomatic nature rather than rules-based and legal approach. In other words, the ASEAN Way entails avoiding or preventing conflict rather than resolving it. The ASEAN Way was introduced from the Malaysian concept of "musjawarah, as refers to the process of decision-making through consultation and discussion" and "mufakat, as refers to the unanimous decision" (Davison, 2004: 165). Elements of the ASEAN Way, which is a political framework, are still an obstacle for the ASEAN (Limsiritong, 2016: 23-24; Puig & Tat, 2015: 295-296).

Professor Micheal Ewing Chow adds that the lack of clearly defined rules and obligations, and effective decision-making institutions has been the result of "the ASEAN way" (Ewing Chow, 2006:264). The enforcement institutions have a difficultly in being impartial. In the opinion of Professor Paolo Vergano, this shows that the ASEAN Way reflects the less confrontational nature of Asian culture which leads governments to prefer negotiation and a diplomatic solution (Vergano, 2009: 7).

3) The Problem with the ACFTA DSM: The first limitation of the ACFTA is that there is no mandate for the ASEAN member states to use these fora to resolve their disputes. That means the ACFTA DSM does not have a "Single forum" requirement. The Framework

Agreement implies that the parties to a dispute may expressly agree, whereby the parties to a dispute can choose and are free to use more than one dispute settlement forum for the same facts in respect of a particular dispute refers to Article 2, paragraph 7. For instance, the two dispute settlement mechanisms may claim that they have the final jurisdiction any reach different decisions. However, the ACFTA avoids parallel proceedings and mandates that, once dispute settlement proceedings have been initiated under the ACFTA or any other treaty to which the parties concerned are signatories, the forum chosen by the complaining party shall be used to the exclusion of any other for such a dispute (Wang, 2018:129). Choosing multiple forums leads to a legal uncertainty whereby the dispute settlement processes of two agreements are activated in parallel. Moreover, the overlab between these two systems can cause a complexity in case of the different legal principles make it difficult to interpret the same provision. In addition, not all private entities are allowed to participate in the dispute settlement process. Private parties need to bring their case by engaging with ASEAN officials to submit the case on their behalf. The domestic corruption also hinder point if the private parties need to bride government officials to have their dispute .

4) Less legally binding rules without any penalty: There is no strict penalty provision under the ACFTA. Referral to Article 13 of the ACFTA DSM shows that compensation should be voluntary with a mutually satisfactory agreement or any compensatory adjustment. The lack of compulsory compensation is limited by the absence of implementation, reflected in its continued informality.

5) A lack of institution: In the case of the ACFTA however, it does not have a standing centralized institution body for dispute resolution. There is no permanent secretariat or central commission for the ACFTA. Without standing cerntralised body affects the lack of contributes organ to coordibate activites, no facilitate consultation as well as the ASEAN is weak international organization.

6) The problem regarding the qualifications of the arbitrators: There is a lack of experts who understand well the ACFTA and business environment pertaing to the ASEAN within Chinese businesses. In other words, many Chinese businesses still lack sufficient understanding about the market information within the ASEAN. These limitations not only apply to the dispute settlement procedures but also to government laws and regulations, as well as the various arrangements within the ACFTA (Flick & Kemburi, 2000: 10). Furthermore, the qualifications of the arbitrators should include expertise and experience in law concerning international trade and other areas covered by the ACFTA. The two parties endeavour to agree on an additional arbitrator who shall serve as chair. A chairman should not be a national of any party or employed by any party to a dispute.

Challenging Factors in the Development of the ACFTA DSM

In dealing with trade disputes, the dispute settlement includes its scope of application, nature and interpretation of the agreement, solution for disputes, the establishment of dispute settlement institutions, for example, expert team and arbitral tribunal, functions, components and procedure. All of these factors have led to conflict among the members in pursuit of their own interests. Moreover, it includes the application of arbitration ruling, and compensation would appear to be the most appropriate under the purposes of the ACFTA DSM.

As mentioned earlier, the ACFTA agreement is a bilateral agreement. This bilateral nature of the obligations is reflected in the dispute settlement mechanism. To explain further, it is a mechanism for resolving disputes between China and the concerned individual ASEAN countries, or disputes between two or more ASEAN nations, if the obligations between them are breached. The success and effectiveness of the ACFTA DSM should follow. Regarding the limitations of the ACFTA DSM as explained above, the importance of an ASEAN-China

FTA was highlighted by the enhancement of the dispute settlement mechanism in the ACFTA DSM. It is important to develop the appropriate ACFTA DSM with an effective dispute settlement procedure as well as establishing the scope of function of the arbitral tribunal to facilitate the effective functioning of the DSM. Moreover, it should be developed from the existing ACFTA DSM to ensure that it can be implemented quickly and give the mandatory compensation for a legally binding resolution.

1) The ACFTA institutional challenge: As discussed above, the ACFTA DSM does not have a single forum; the parties should choose only one forum to solve the dispute between them. There may be opportunities to develop the ASEAN's supranational institution like the EU. The European Union (EU) model for regional integration is based on being legally bound under a supranational regime with well-established enforcement mechanisms. Some ASEAN scholars have pointed out that it is possible for the ASEAN to adopt some practices from the EU model, but it does not need to necessarily adopt the exact practices of the EU. In addition, the institutional design should be in cooperation with government structure within a regional institutionc region (Ewing Chow, 2006: 252). Moreover, a strong Secretariat will also help as a standing body for a dispute resolution. The training of the Secretariat staff with the potential to provide legal opinions could be a further step to develop the structure of the Secretariat.

2) Improving support for resolving disputes: The lack of information regarding the dispute settlement mechanism suffers from capacity problems. Recommendations could be developed to support the infrastructure for DSMs. Such support might include; support on a cost recovery basis as well as referral to existing arbitration organisations or other centres.

3) Challenging factors regarding arbitrators: In any decision-making process, independence and impartiality are a very important aspect. Looking through the ACFTA DSM Framework, there is no mention in the Code of Conduct to provide a general obligation for the arbitrators to be "Independent and Impartial" to act in a fair manner without any bias. Arbitrators are also required not to be influenced by self-interest, outside pressure or political consideration. Furthermore, the obstacle of language in arbitration should also be discussed. Chinese is the language of China, and in the ASEAN there are many variations of language, such as English, Thai, Laos, Vietnamese, etc. For this reason, it would be better if the arbitrator could speak three or four official languages, as different languages are used in ASEAN countries. As there is no common language for all countries, this would make it easier to conduct the proceedings.

4) Enforcement and legal commitment: Once a decision has been rendered, it must be decided how it will be brought into force and become legally binding. Decisions can become binding after approval by the member states, like the WTO. The adoption by negative consensus means that decisions are adopted unless all parties agree not to adopt them. The question arises as to what remedies are available in case of treaty violation or breach of their agreement. Ideally, they should have a direct enforcement effect of the rulings in domestic law like the European Court of Justice (Wang, 2008: 132). This means that the ACFTA does not grant a domestic enforcement effect to rulings made by the dispute settlement process. Professor Smith suggests that the permission allows for the complaining parties to impose sanctions or take any measures against the responding party (Wang, 2008: 131).

Regarding compensation and compliance, they should be coupled with a stronger enforcement mechanism. Compensation is usually defined as a "mutually satisfactory agreement", therefore, the imposition of sanctions would improve the credibility. The ACFTA DSM should impose sanctions on states that violate their agreement.

Conclusion

The full implementation of the ASEAN-China Free Trade Area is still facing challenges that need to be taken into consideration. It has marked a major milestone in relations between China and the Southeast Asia Nations. The ACFTA is potentially beneficial for both sides. Interestingly, not a single dispute has been handled by this mechanism and it is uncertain whether or when it will be used in the future. The increase in the number of free trade agreements also leads to an increasing number of disputes. However, it cannot guarantee that conflict will not arise between China and the members of the ASEAN regarding the ACFTA agreement in the future. The study of the ACFTA's dispute resolution systems led to the capacity of the member countries of this agreement to prevent and resolve their conflicts. To be most effective within the ACFTA, the ASEAN members, and also China, must work collectively through the establishing of goals. The building of an ACFTA DSM is moving toward fulfillment.

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